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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 446

MICHAEL GLUS,

Petitioner,

against

BROOKLYN EASTERN DISTRICT TERMINAL,

Respondent.

RESPONDENT'S BRIEF

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MICHAEL GLUS,

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RESPONDENT'S BRIEF

Statement

The petitioner commenced this action under the Federal Employers' Liability Act (45 U.S.C., §§ 51 *et seq.*) to recover damages for an industrial disease which, he alleged, he contracted as a result of his working under unsafe conditions created and maintained by his employer, the respondent. Petitioner brought this action some five years after the occurrence of the accident for which he sought damages. Respondent moved in the District Court to dismiss the complaint on the ground that petitioner did not commence his action within the time prescribed by the statute (45 U.S.C., § 56). Petitioner opposed this motion arguing that Paragraph nine (9) of his complaint alleged facts sufficient, if proved at the trial, to estop re-

spondent from interposing the limitation of time in the Act. Paragraph nine (9) states:

> "9. Subsequent thereto defendant's agents, servants and employees fraudulently or unintentionally misstated to plaintiff that he had seven years within which to bring an action against said defendant as a result of his industrial disease and in reliance thereon plaintiff withheld suit until the present time." (R. 1).

The District Court granted respondent's motion and dismissed the petitioner's complaint. The United States Court of Apeals for the Second Circuit, in a *per curiam* opinion, unanimously affirmed the dismissal (R. 7-9).

This Court granted certiorari on October 13, 1958 (R. 10).

Questions Presented

The questions presented by this appeal are two:

1. Whether the period of limitations contained in Section 6 of the Federal Employers' Liability Act can be extended by reason of fraud or misrepresentation by the defendant inducing a prejudicial delay by the plaintiff;

2. Assuming the answer to the first question to be in the affirmative, whether the representations allegedly made in this case were sufficient to create such an estoppel.

POINT I

The statute of limitations contained in the Federal Employers' Liability Act does not permit estoppel for fraud or misrepresentation by a defendant.

In the fifty years that followed the enactment of the Federal Employers' Liability Act many state and fed-

eral courts passed on the precise question at bar and questions integrally related to it. The vast majority of the decisions of these courts support the conclusion reached below that the statute of limitations here cannot be tolled by the defendant's fraud or misrepresentation. It is inescapably significant that in the forty years immediately following the enactment of the Federal Employers' Liability Act no court held otherwise. Three contrary cases have been reported. The first of them was not decided until 1949. These three decisions, the respondent urges, are contrary not only to the overwhelming and historic weight of authority, but they reach a result which demonstrably the Congress did not intend when it enacted the Federal Employers' Liability Act. The judicial history that preceded the adoption of the Federal Employers' Liability Act in 1908, the language of the Act itself, and the subsequent cases, all point ineluctably to the conclusion that the period of limitation under consideration was designed as an unavoidable condition of the right created by the Act, a condition that could neither be waived nor forfeited.

Long before 1908 there was recognized in the law a distinction between ordinary statutes of limitations and limitations prescribed in statutes which created a new right and liability. In the latter instance, time was deemed to have been made an integral part of the right created and an indispensable condition to its availability. A lapse of the prescribed period was held to operate as a total extinguishment of the right. As to such limitations, the rules of law governing general statutes applicable to classes of actions had no effect. Unlike the ordinary or general periods of limitations, those which were part of a statute creating a new right were held to be immune from the disabilities and extenuations through which the efficacy of ordinary statutes of limitations might be avoided. Even proof of fraud inducing delay would not suffice to prevent operation of the bar.

See e.g.:

Bartlett v. *Manor*, 146 Ind. 621, 45 N. E. 1060 (1897);
Luther v. *Luther*, 122 Ill. 558, 13 N. E. 166 (1887);
Taylor v. *Coal Co.*, 94 N. C. 525 (1885);
13 Am. & Eng. Enc. (1st ed.), pp. 689-690;
19 Am. & Eng. Enc. (2nd ed.), pp. 150-151;
1 Wood on Limitations of Actions (2nd ed.), pp. 1-2.

Cf.:

The Harrisburg, 119 U. S. 199 (1886);
P. C. & St. L. Ry. Co. v. *Hine*, 25 Ohio St. 629 (1874).

In the 19th century the courts at first evidenced a marked aversion to the enforcement of limitations of time created by statute. By the beginning of the 20th century the courts —particularly the federal courts—had overcome their pristine aversion to these limitations. With the advent of the 1900s, the courts began to see in these different statutes of limitations a general usefulness that more than outweighed the occasional hardships inflicted by their rigid application. There followed generally in the United States a judicial course of strict adherence to legislative time limitations. Only those exceptions specified in the statutes themselves were honored by the courts. Where the Statute of Limitations made no exception, the courts held themselves powerless to supply one.

Murray v. *Chicago & N. W. Ry. Co.*, 92 Fed. 868 (8th C., 1899);
Amy v. *City of Watertown*, 130 U. S. 320 (1889);
Bauserman v. *Blunt*, 147 U. S. 647, 657 (1893);
Wood, Limitations of Actions (4th ed.), §§ 4 n. 30 at pages 7-10; 11b at page 55.

This was all familiar law when the Congress had before it for consideration the enactment of the Federal Employers' Liability Act. Quite apart from the question of the wisdom of this body of law, its existence has an obvious significance in the case at bar. Plainly the law prevailing at the time this legislation was enacted by Congress is a valuable if not indispensable aid in the construction of the Act. Both as a matter of logic and construction, the Act of 1908 must be interpreted on the premise that the Congress was aware of this body of law and took it into consideration when it enacted this legislation.

2 Sutherland on Statutory Construction (3rd ed.), § 4510.

See:

Hecht v. *Malley*, 265 U. S. 144, 153 (1923).

Thus, when Congress provided in Section 6 of the Act that:

> "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued." (April 22, 1908, c. 149, § 6, 35 Stat. 66)

and made no exception, it must have realized—and consequently intended—that as a statute of limitations conjoined to a newly created statutory right, it would be construed as an exceptionless and indispensable condition of liability.

It was not long before these expectations were fulfilled. Both the state and federal courts held that the period of limitation was a condition of the new right created by the Act and could not be evaded by a showing of disability or fraud. The rationale offered was the same one found in the early cases which preceded the Act's adoption. Thus, in one of the first cases to construe Section 6 of the Act

(*Bement v. Grand Rapids & I. Ry. Co.*, 194 Mich. 64, 160 N. W. 424 (1916)), it was said:

> "A positive distinction seems to be made between cases in which the limitation of time for bringing suit is contained in the statute which creates the liability and right of action and general statutes of limitations of the rights of action existing under other statutes or under the common law. In the former the limitation of time is a limitation of the right, and, as has been said, the suit cannot be maintained if not brought within the time limited. In the latter the limitation of time for bringing suit is a limitation of the remedy only, and it has been held that under such general statutes of limitations the defendant may be estopped from the benefit of the statute by an agreement waiving it, or by concealment or by fraud. The statute here in question creates a new liability, and takes away defenses formerly available, and the right of action therein created is conditioned upon its enforcement within a prescribed period. The action not having been brought within such period designated by the statute, it is lost. . . ." (*Bement, supra*, at p. 425).

It was held, accordingly, that alleged fraudulent representations by the defendant which induced plaintiff to forebear suit until the statute had run could not create an estoppel.

Similar statements appear in most of the early cases construing Section 6. All of them held as did the *Bement* case.

See e.g.

Morrison v. *B. & O. R. Co.*, 40 App. D. C. 391 (1913);

Omin v. *Balt. & O. S. W. R. Co.*, 8 Ohio App. 161 (1917);

Gillette v. *Delaware, L. & W. R. Co.*, 91 N.J.L. 220, 102 Atl. 673 (1917);

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Bell v. *Wabash Ry. Co.*, 58 F. 2d 569 (8th Cir. 1932);

Thornton, Federal Employers' Liability and Safety Appliance Act (2d ed., 1912), § 114, pp. 173-174;

2 Roberts, Federal Liabilities of Carriers (2d ed., 1929), § 947, p. 1829; § 951, p. 1833;

Cf.:

Central Vermont Ry. Co. v. *White*, 238 U. S. 507 (1915).

Atlantic Coast Line R. R. v. *Burnette*, 239 U. S. 199 (1915).

By 1939 the judicial construction given Section 6 was consistent, uniform and unmistakable. Without exception, in each case where the question of the statute of limitation's susceptibility to estoppel or avoidance because of disability was raised, it was decided that the period was an absolute condition to the right, impervious to exception. In 1939 the section was subjected to formal scrutiny by the Congress in connection with the proposed amendment of so much of the section as dealt with the period of limitations. The result of Congress' deliberations was an enlargement of the period from 2 to 3 years (53 Stat. 1404; Aug. 11, 1939). Significantly, no other change was made insofar as the period of limitations was concerned.

As urged by the respondent earlier in its brief, it must be reasoned that at the time of the amendment the Congress had in mind the judicial construction given the section before 1939. Thus, it must be clear that had Congress not been satisfied with the state of the law as it then was, it would have been a relatively simple thing to change it

by the insertion of an express exception.[1] Its acquiescence belies dissatisfaction and shows that the construction given by the courts was precisely the one intended by the Congress. This, of course, would be so even if the decisions prior to 1908 had not been cast in the same mold.

See:

2 Sutherland, *supra;*
In the Matter of John J. Goff, Inc., 141 F. Supp. 862 (S. D. Maine, 1955).

In the decade that followed the 1939 amendment the courts continued to construe the statute as it had been construed in the prior 30 years: there could be no estoppel against use of the statute of limitations because of fraud or misrepresentation.

Damiano v. *Penn. R. Co.*, 161 F. 2d 534 (3rd Cir., 1947), cert. denied 332 U. S. 762 (1947);
Osbourne v. *United States*, 164 F. 2d 767, 768 (2d Cir., 1947) (dicta);
Ahern v. *South Buff. R. Co.*, 303 N. Y. 545, 563 (1952); aff'd 344 U. S. 367 (1953).

See:

Pollen v. *Ford Instrument Co.*, 108 F. 2d 762 (2d Cir. 1940);
Adams v. *Albany*, 80 F. Supp. 876 (D. C. Cal., 1948);

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[1] It might profitably be noted at this point that even before 1908 Congress, in at least one case, had made good use of its obvious and convenient power to make exceptions to a statute of limitations. Thus, in a custom law enacted in 1874 Congress had created an action for forfeiture of property under certain circumstances. The creative statute contained a 3 year limitations period. Had nothing more been said this limitation would have been construed as an indispensable condition to the right regardless of fraud or concealment of the property. Because it was intended that fraud should toll the period of limitations express provision to that effect was made (Act June 22, 1874, c. 391, § 22, 18 Stat. 190).

United States v. *Dawes*, 151 F. 2d 639 (7th Cir., 1945), cert. denied 327 U. S. 788 (1946); *Sgambati* v. *United States*, 172 F. 2d 297 (2d Cir., 1949).

No effort was ever made by the Congress to obviate the impact of these cases. This omission confirms the conclusion that no other result was ever intended or desired.

Three cases, all of comparatively recent vintage, are contrary to the accumulated decisions of the first forty years under the Act. The first of these was *Scarborough* v. *Atlantic Coast Line R. Co.* (178 F. 2d 253 (4th Cir., 1949), cert. denied 339 U. S. 919 (1950); 190 F. 2d 935 (1951); 202 F. 2d 84 (1953)). The second, *Fravel* v. *Pennsylvania R. Co* (104 F. Supp. 84 (D. C. Md., 1952)) was controlled by the earlier *Scarborough* case decided by the Court of Appeals of the same (4th) Circuit. The last, *Toran* v. *New York, N. H. & H. R. Co.* (108 F. Supp. 564 (1952)), was decided seven years ago in a Massachusetts District Court.

The bases upon which these three decisions rest are fairly and neatly summarized in Judge Bryan's opinion below (R. 5-6). These bases are, singly and in combination, highly vulnerable. Thus, the contention that the Federal Employers' Liability Act did not create a new cause of action unknown to the common law is plainly erroneous.

> "There is no question, that the Federal Employers' Liability Act created a cause of action unknown to the common law."
>
> *Frabutt* v. *N. Y., Chic. & St. Louis R. Co.*, 84 F. Supp. 460, 464 (D. C., Pa., 1949).

Mr. Justice Holmes put this question to rest just a short time after the Act's passage. In *Atlantic Coast Line R. R.* v. *Burnette* (*supra* at p. 201), he said, in speaking of the Act:

> "At all events the act of Congress creates the only obligation that has existed since its enactment in a case like this, whatever similar ones formerly may have been found under local law emanating from a different source."

Before the enactment of 1908 the law controlling the liability of railroad companies engaged in interstate commerce to their employees depended upon the diverse statutes and decisions of the various states. Each accident was governed by the particular law of the state in which it occurred.

> "From this babel of judicial voices with its consequent glaring inequities and inequalities, came the national act, declaring one rule of liability throughout the nation and with it, as a necessary concomitant, the decisions of the national courts, construing the act in all its parts, became binding upon all state courts. The fellow-servant doctrine was abolished; something akin to comparative negligence was substituted for contributory negligence; assumption of risk in certain cases was abolished; contracts for a consideration of indemnity waiving the right to sue were declared void and the principle of compensation as a substitute for penalties in the way of damages which regulated recoveries in certain states was adopted."
>
> Roberts, Federal Liabilities of Carriers, *supra*, § 704 at page 1315.

In short, the Federal Employers' Liability Act created a new right.

Much of the opinion in the *Toran* case proceeds on the theory that it would not have been repugnant to the demonstrated purpose of the Act for Congress to have permitted an equitable estoppel exception to the period of lim-

itations. The short answer to that contention is that Congress could have accomplished that result, if desired, by the simple expedient of an express exception at any time during the past 50 years. It has not done so.

Congress, it must be presumed, was aware of the state of pertinent judicial decisions before the enactment of the Federal Employers' Liability Act and the body of pertinent law that followed its enactment in the subsequent years (*In the Matter of John S. Goff, Inc., supra*). The failure of Congress to provide an exception, first in the enactment and later in the amendment of the Act, is a formidable expression of Congressional satisfaction with the unanimous judicial opinion on this question.

Nor can it be persuasively argued that Section 5 of the Act permits such an estoppel. That section provides:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be *void*. . . ." (45 U.S.C., § 53) (Emphasis supplied).

It is clear from the nature of the sanction provided in this section that it contemplated agreements, releases from liability and the like whose purported effect was to bind the employee in a contractual sense. Thus, the provision that such devices are to be deemed "void." Clearly, there is nothing of a contractual or similar nature in the conduct asserted by petitioner to be creative of an estoppel in this case.

The suggestion that the addition of the words "and not after" to the limitations contained in the Interstate Commerce Act (49 U.S.C., § 16 (3)) and the Informer's Act (31 U.S.C., § 235) accounts for the fact that in those instances the limitations are held not only to bar the remedy but also to destroy the liability is hardly persuasive.

Those three words have no talismanic effect. As a matter of pure semantics they would add nothing to the plain injunction already contained in the Act's statute of limitations. Certainly, a literate Congress could be expected to produce a more imaginative linguistic distinction between statutes that were intended to be so basically and substantially different.

Finally, it is inaccurate to conclude from the fact that the period of limitations in the Federal Employers' Liability Act is an absolute one that therefore the rights under the Act are less favorable to a defrauded employee than those given him by the common law. Even if it can be assumed that the construction put upon the limitation provision by the courts below was a less liberal one than would have obtained in most of the states at common-law, that provision is only one aspect of the new right created by the Act. In all other regards the statute heaps upon the employee benefits and advantages not his at common law. It does not seem unreasonable that a Congress which had given so much to the employee in the form of a new right might exact in return, to the benefit of the employer, some part of the rights formerly held by the employee.[2]

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[2] Compare New York's Workmen's Compensation Law. This act created a substantial new right in favor of the employee, an action against the employer for all damages caused by "on the job" accidents whether resulting from the negligence of the employer or without any fault on his part. In return, however, as a sort of compromise, it took from the employee his traditional action in negligence against his employer for such accidents and limited the recoverable awards to figures considerably less than might have been obtained in common law actions. (See McKinney's Workmen's Compensation Law, §§ 10, 11, 14.)

POINT II

Assuming that the statute of limitations contained in the Federal Employers' Liability Act allows an exception by estoppel, plaintiff has not alleged facts sufficient to establish such an estoppel.

Should this Court find that the statute of limitations in the Federal Employers' Liability Act may be tolled by the application of equitable estoppel, the present action was nonetheless properly dismissed. Even where the doctrine of equitable estoppel may be invoked to postpone or extend a statute of limitations, the doctrine does not apply unless the traditional elements of estoppel are in the case. A primary and indispensable element is a *justifiable* reliance by the plaintiff upon the representations made by the defendant. Historically, as a general rule, there is no justification for a reliance upon a misrepresentation of *law* made by a defendant. And that is all the petitioner alleges here in attempted avoidance of the limitation.

> "Subsequent thereto defendant's agents, servants and employees fraudulently or intentionally misstated to plaintiff *that he had seven years within which to bring an action against said defendant* . . ." (R. 1) (emphasis supplied)

Petitioner was fully aware of the facts and circumstances of his accident. The representation allegedly made to him by respondent's employees were opinions as to a matter of law, the length and operation of the statute of limitations. Petitioner was free to—and prudence dictated that he should—see an attorney as to the law surrounding his claim. The failure to do so and the reckless reliance upon what on this pleading may even have been the innocently erroneous opinion of an unqualified layman, takes him without the scope of the estoppel exception.

It would appear that the District Judge below shared this opinion. He did not pass on the question, however, because of the determination that under no circumstances could there be an exception based on estoppel (R. 6). The case he cited, *Hilliard* v. *Pennsylvania R. Co.* (73 F. 2d 473 (6th Cir., 1934)), is in point. There, defendant's claim agent had stated to the infant plaintiff's father shortly after the accident that "when the boy gets to be twenty-one years old he can determine for himself whether he will file a lawsuit or not." The Court said:

> "This statement did not amount to an express promise or agreement not to rely upon the statutes, as in *Schroeder* v. *Young*, 161 U. S. 334, 16 S. Ct. 512, 516, 40 L. ed. 721. In our view, it was but an expression of the opinion of the claims adjuster as to a matter of law. Nothing appears in the record to indicate that he was an expert in the laws of limitation or that the facts were not as well known to the father as to him. Each of the parties was chargeable with knowledge of the law. *Mutual Life Ins. Co. of N. Y.* v. *Phinney*, 178 U. S. 327, 342, 20 S. Ct. 906, 446 Ed. 1088. The expression by the claims adjuster of his opinion as to the law, in such circumstances, cannot therefore, operate as an estoppel . . ." (73 F. 2d 473, 475-476).

Also:

Shunney v. *Fuller Co.*, 111 F. Supp. 543 (D. C. Rhode Id., 1953);
Upton v. *Tribilock*, 91 U. S. 45, 50 (1875);
Sturm v. *Broker*, 150 U. S. 312, 336 (1893);
Adams v. *Cameron*, 95 Ala. 344, 10 So. 506, 507 (1892);
Sontcvh v. *Sharon Steel Corp.*, 73 F. Supp. 825 (D. C. Pa., 1947);
n 130 ALR 8, 53-55;
n 24 ALR 2d 1413, 1443.

See:

Waugh v. *Lennard*, 69 Ariz. 214, 211 P. 2d 806 (1949).

Nothing in the *Scarborough*, *Fravel* or *Toran* cases calls for a different result. In *Toran* the representation alleged was not specified. In *Scarsborough* and *Fravel* there were promises to pay on the part of the defendant which brought those cases within the scope of the case of *Schroeder* v. *Young* (161 U. S. 334 (1895), cited in the quotation from *Hilliard* v. *Penn. R. Co., supra*)). Here there was no assurance or promise by respondent that it would pay the award if petitioner delayed; there was only the mistaken opinion on a matter of law. That was insufficient to create an estoppel.

CONCLUSION

The judgment for defendant dismissing the complaint should be affirmed.

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